90-653 No. (1)

IN THE

Supreme Court of the United States

October Term, 1990

JUDYBILL OSCEOLA, Enrolled Member of
the Seminole Indian Tribe of Florida,
et al., and all others similarly situated,

Petitioner,

against

FLORIDA DEPARTMENT OF REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the United States District Court for the Southern District of Florida lack subject matter jurisdiction over this case pursuant to the Tax Injunction Act and the Eleventh Amendment to the United States Constitution, affirmed by the United States Court of Appeals for the Eleventh Circuit?

2. Can an individual enrolled member of a federally recognized Indian tribe assert federal court jurisdiction under the co-plaintiff doctrine to the federal instrumentalities exception to the Tax Injunction Act as supported by the precedent underlying the Commerce Clause of the United States Constitution as it pertains to Indians?

3. Does the State of Florida provide a plain, speedy, and efficient remedy (Fla. Const. art. V, sec. 20(c)(3)) to resolve a tax case wherein an Indian or tribe is a party?

4. Is jurisdiction conferred by 28 U.S.C. 1343(3) and 42 U.S.C. 1983 in that the State of Florida Department of Revenue acting under color of

law deprived petitioner of rights, privileges and immunities secured by the Constitution and laws of the United States by wrongfully taxing her and depriving her of her property?

5. Does this Court have jurisdiction in light of the fact that the Eleventh Circuit Court of Appeals based its affirmation of the District Court ruling on numerous cases which are in conflict with other Circuit Courts of Appeal and in conflict with the United States Supreme Court rulings based upon a fundamental philosophical commitment to justice and fairness for a dependent people?

6. Was petitioner correct in bringing her action as a class action in that the class is so numerous that joinder of all members is impracticable; that there are questions of law or fact common to the class; that the claims or defenses of petitioner are typical of the claims or defenses of the class; and that the petitioner will fairly and adequately protect the interests of the class?

PARTIES TO THE PROCEEDING BELOW

Petitioner Judybill Osceola, et al enrolled member of the Seminole Indian Tribe of Florida and all others similarly situated, seeks a Writ of Certiorari to review an order of the Eleventh Circuit Court of Appeals of the United States which affirmed an order of the United States District Court for the Southern District of Florida (Hon. Jose A. Gonzalez, Jr.).

There were no other parties to these proceedings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS PAGE

FEDERAL

STATE

STATUTES

FEDERAL

STATE

OPINIONS

Jurisdiction and Opinions Below

The Eleventh Circuit Court of Appeals denied petitioner's Petition for Suggestion of In Banc Hearing on April 11, 1990 for a review of Osceola v. Florida Dept. of Revenue, F2d 1528 (11th Cir. 1990), which affirmed the order of the United States District Court for the Southern District of Florida, 705 F. Supp. 1552 (S.D.Fla. 1989).

Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. 1254(1) and Rules of the Supreme Court, Rule 10(1)(a) and (c).

Constitutional Provisions and Statutes Involved

Constitutional Provisions

Article 1, Section 8, Clause 3

Indian relations became the exclusive province of federal law.

Amendment Five/Amendment Fourteen

No person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

Statutes

4 U.S.C. 105-110 (The Buck Act)

The Buck Act, which granted permission to the states to levy and collect sales, use and income taxes in Federal areas, specifically excepted Indians residing on federally recognized Indian reservations from being taxed by the state on state sales tax and state use tax (Section 105) and on state income tax (Section 106).

28 U.S.C. 1331

The district courts have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. 1341

"(t)he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and

efficient remedy may be had in the courts of such State."

28 U.S.C. 1343(3)

"—The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

...

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by an Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

42 U.S.C. 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress."

STATEMENT OF THE CASE

The Seminole Indian Tribe of Florida became a federally recognized Indian tribe through the Seminole Indian Reservation Act of July 20, 1956. 25 U.S.C. 465. The Florida Department of Revenue has been illegally taxing the enrolled members of the Seminole Indian Tribe of Florida who reside on five federally recognized Seminole Indian Reservations including approximately 1314 enrolled members (approximately 472 members on the Hollywood Reservation in Broward County, Florida, 361 members on the Brighton Reservation in Glades County, Florida, 395 members on the Big Cypress Reservation in Hendry County, Florida, 49 members on the Tampa Reservation in Hillsborough County, Florida, and 37 members on the Immokalee Reservation in Collier County, Florida.)

The Florida Department of Revenue has wrongfully assessed and collected sales taxes and franchise taxes on the purchase by the enrolled members of automobiles and other vehicles, mobile

homes, goods and materials used to make home improvements, telephone service, electrical service, propane gas service and similar items that were purchased either on the reservation, or that were purchased off the reservation and delivered by merchants to the reservation, thereby becoming annexed to tribal land.

Petitioner seeks to represent the class of all enrolled members residing on the five different reservations comprising the federally recognized Seminole Indian Tribe of Florida by enjoining the Florida Department of Revenue from continuing to wrongfully assess and collect illegal sales taxes and franchise taxes, and by seeking to recover all sales taxes and franchise taxes erroneously and improperly collected.

Petitioner was required to seek federal court jurisdiction because there is no speedy, plain and efficient remedy in the State of Florida regarding resolution of a tax dispute for an Indian. The only other case regarding the State of Florida and the Seminole Indians on a taxation matter, Askew v.

Seminole Tribe of Florida, 474 So. 2d 877 (Fla. App. 4 Dist. 1985) took nine years to litigate, which length of time on its face is neither speedy nor efficient. Further, the State of Florida, pursuant to F.S. 214.16, limits the recovery of tax refunds to three years, whereas the federal courts have no limitation on recovery of wrongfully imposed taxes for an Indian. Red Eagle v. U.S., 300 F.2d 772 (Ct. Cl. 1962). Dodge v. U.S., 362 F2d 810 (Ct. Cl. 1966). The three year limitation period of the State of Florida forces petitioner into federal court to seek recovery of all taxes illegally taken without limiting her due process and equal protection rights. Otherwise, she would be limited to recovery of only three years of illegally exacted taxes were she forced to litigate in Florida state court, clearly an unequal forum.

On February 17, 1989, the United States District Court for the Southern District of Florida, without a hearing, dismissed petitioner's petition for lack of subject-matter jurisdiction and denied as moot petitioner's motion for class certification.

Osceola v. Florida Dept. of Revenue, 705 F.Supp. 1552 (S.D. Fla. 1989). The court misinterpreted certain facts and minimized or misapplied controlling federal case law and erroneously relied on Florida state law as controlling. The lower court's ruling thereby prevented petitioner from seeking to recover more than three year's of wrongfully imposed taxes by attempting to force her into state court.

On February 6, 1990, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court and held that an individual Indian could not avoid the bar of the Tax Injunction Act under the instrumentalities exception. Osceola v. Florida Department of Revenue, F2d 1528 (11 Cir. 1990). Relying on the lower court's opinion, again the court misinterpreted certain of the facts and minimized or misapplied the law, thereby departing from the strong federal policy of states not taxing Indians and denying Indians access to an impartial forum. U.S. v. Kagama, 118 U.S. 375 (1886). The court ignored controlling federal precedent reiterated in Bryan v. Itasca County, 426 U.S. 373

(1976) which stated that "...'statutes passed for the benefit of dependent Indian tribes...are to be liberally construed, doubtful expressions being resolved in favor of the Indians," at 392 (quoting Alaska Pac. Fisheries v. United States, 248 U.S. 78 (1918). The lower court's decision violated petitioner's Constitutional due process and equal protection rights by affording tribal entities greater protection and greater rights than the individual members making up the tribe. The precedent erroneously relied upon by the lower federal courts allowed only the tribe to seek federal court jurisdiction and not the enrolled members of the tribe. The lower courts ignored the crucial nexus between the tribe and its individual members who make up the tribe, and thereby denied petitioner access to the only impartial forum in which she could seek complete redress for her injuries. On April 11, 1990, the United States Court of Appeals denied petitioner's petition for Suggestion of Rehearing In Banc.

REASONS FOR ALLOWANCE OF THE WRIT

1. This Court Has Never Ruled on the Specific Question Whether the Tax Injunction Act is a Bar to Federal Court Jurisdiction to an Individual Enrolled Member of a Federally Recognized Indian Tribe.

Although this Court has considered various aspects of the question and has implied an affirmative response, it has never given a direct ruling on the question. In Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976), the Court noted probable federal court jurisdiction for individual Indians. In footnote 14, the Court stated: "Any further proceedings with respect to refund claims by or on behalf of individual Indians..., would not appear to implicate Section 1341." Id. at 475. The federal district court found jurisdiction over the tribe and individual Indian plaintiffs and stated that jurisdiction was not defeated by the Tax Injunction Act. The

District Court, affirmed by this Court, concluded that the Tax Injunction Act does not bar federal court jurisdiction for persons or entities in which the United States has a real and significant interest.

2. This Court Has Never Ruled On Whether An Individual Enrolled Member of a Federally Recognized Indian Tribe Can Assert Federal Court Jurisdiction Under the Principles Invoked by the Commerce Clause of the United States Constitution As It Applies to Indians.

In McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973), this Court observed: "The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making." Id. at 172 n 7 (citations omitted). The source of this federal responsibility is the Commerce Clause of the United

States Constitution which states that Congress is authorized to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. 1, sec. 8, cl. 3. This source of federal power over Indian affairs encompasses transactions with and permits federal regulation of individual Indians who are members of the tribes, as well as the tribes themselves. U.S. v. Holliday, 70 U.S. (3 Wall.) 407, 417-18 (1866). U.S. v. Mazurie, 419 U.S. 544, 554-56 (1975).

The intention of this Court has always been to place the Indian in an impartial forum that could not be subject to the inherent prejudice that could arise in a State court. Such a philosophy has been expressed in U.S. v. Kagama, 118 U.S. 375 (1886), as stated in the Court's description of Indian tribes as wards of the nation:

> "Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing with the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection,

and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen." Id. at 384.

This same philosophy has been expressed in Dodge v. United States, 362 F.2d 810 (Ct. Cl. 1966) which held that the statute of limitations does not apply to deny a refund claim to a noncompetent Indian, which refund claim arose as a result of an error caused by a government agent.

> "The opinion of the then Attorney General Harlan F. Stone is the rock upon which plaintiff founds his case. The crucial portion of the opinion says (34 Ops. Att'y Gen. 302, 305 (1924)):
> * * *In fact, so far as the actual payment is concerned, it was in many cases a matter of bookkeeping and so perfunctory that the Indians accepted it as a matter of course and as an unquestionable expenditure of their funds by their conservator and guardian acting for the paternalistic Federal Government. The superintendent acted for them because of their recognized incompetency to act for themselves. The governmentally appointed agent—I refer to the superintendent—having paid this money over, failed to discover the irregularity of his action within the five-year period provided by the income-tax statutes as the limitation period for making claims for recovery. The Indian is not to blame for this, and, if the Government could take advantage of the mistake of its own agent in this regard, it could

> go just one step farther and in the interests of its revenue instruct the superintendent to allow such claims to lapse. It is needless to remark that such a practice would be repugnant to our conception of a just and fair government's policy toward this dependent people. Having appropriated the funds of its wards under a misapprehension, it should have no hesitancy in returning them. * * * " Id. at 812.

The Court further stated that the opinion reached in this case "concentrates on the necessity of dealing fairly with a group of people still placed under a disability of dependency and to which a greater obligation is owed than a narrowly legalistic view of what constitutes a technical 'duty'." Id. at 813.

3. The State of Florida Fails to Provide A Plain, Speedy and Efficient Remedy For An Indian To Resolve A State Tax Dispute

The Tax Injunction Act should not bar federal court jurisdiction for petitioner because there is no plain, speedy and efficient remedy for her tax

dispute within the State of Florida. The only other case regarding the State of Florida and the Seminole Indians on a taxation matter, Askew v. Seminole Tribe of Florida, 474 So. 2d 877 (Fla. App. 4 Dist. 1985) took nine years to litigate, which time period on its face is neither speedy nor efficient. Further, Florida Statute 214.16 would bar petitioner's efforts to seek a tax refund beyond a three year period, although federal court jurisdiction would allow petitioner to seek recovery of all taxes illegally taken from her without any statute of limitation. Red Eagle v. U.S., 300 F.2d 772 (Ct. Cl. 1962), and Dodge v. U.S., 362 F2d 810 (Ct. Cl. 1966) ruled that it is against U.S. policy to assert the statute of limitations against a lawful refund claim filed by or for its fullblooded, restricted, noncompetent Indian wards, and that when taxes are erroneously paid by a restricted Indian, they can be recovered without regard to any refund period.

4. The Decision of the United States District Court for the Southern District of Florida,

Affirmed by the Eleventh Circuit Court of Appeals conflicts with this Court's Rulings That Congress Has Never Given the State of Florida the Right to Tax Reservation Indians and Conflicts With This Court's Rulings That Federal Jurisdiction is Conferred by 28 U.S.C. 1343(3) And 42 U.S.C. 1983

Justice Black summed up the strong federal policy regarding Indian legislation in Williams v. Lee, 358 U.S. 217 (1959):

> "Congress has acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." Id. at 218-219.

The only way in which Indians residing on Indian lands can be taxed is through an Act of Congress. Congress has never given the State of Florida the right to tax reservation Indians since the Seminole Indian Tribe became a federally recognized tribe. The only legislation that Congress has enacted that affects the Seminole Indians is Public Law 280, Aug. 15, 1953, 25 U.S.C.

1321-1326. This Court specifically exempted states from taxing Indians under Public Law 280 in Bryan v. Itasca County, 426 U.S. 373 (1976), and reiterated its commitment to justice, equity and fairness for this dependent people:

> "...we must be guided by that 'eminently sound and vital canon,' that 'statutes passed for the benefit of dependent Indian tribes...are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'... Indians stand in a special relation to the federal govenment from which the states are excluded unless the Congress has manifested a clear purpose to terminate [a tax] immunity..."

This Court has ruled in Moe v. Confederated Salish & Kootenai Tribes, 415 U.S. 463 (1976) that the Tax Injunction Act does not bar federal court jurisdiction if there is an independent basis for federal jurisdiction. The Court, noting that the "rights, privileges, or immunities secured by the Constitution and laws" referred to in 42 U.S.C. 1983 include all of the Constitution and laws of the United States, found the alleged violation of /Commerce Clause rights to be sufficient to state a

cause of action under Section 1983, and found Section 1343(3) to be the jurisdictional counterpart of Section 1983.

This Court has recognized that individual Indians of a federally recognized Indian tribe have the undeniable right to come before this Honorable Court to seek redress for taxes wrongfully imposed by a State. However, the lower federal courts have continued to ignore that 28 U.S.C. 1343 (3) and 42 U.S.C. 1983 allow petitioner the right to bring this issue in the federal courts of the United States. Petitioner would be precluded from equal protection and due process before the law were she not allowed federal court jurisdiction in that she would be precluded from recovering wrongfully imposed taxes beyond a three year period were she forced to litigate in the state court.

5. The Eleventh Circuit Court of Appeals Reliance Upon the Tax Injunction Act and the Eleventh Amendment to the United States Constitution Is In Conflict With the Eighth Circuit Court of

Appeals in Omaha Tribe of Indians v. Peters and With the Court of Claims in Dodge v. U.S. and With This Court's Rulings in McClanahan v. Arizona Tax Commission and Moe v. Confederated Salish & Kootenai Tribes

This Court has previously set forth the strong federal policy that Congressional legislation confers individual rights on individual Indians even though Congress has most often dealt with tribes as collective entities:

> "To be sure, when Congress has legislated on Indian matters, it has, most often, dealt with the tribes as collective entities. But those entities are, after all, composed of individual Indians, and the legislation confers individual rights. This Court has therefore held that 'the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and to be ruled by them.' Williams v. Lee supra, at 220 (emphasis added). In this case, appellant's rights as a reservation Indian were violated when the state collected a tax from her which it had no jurisdiction to impose." McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973) at 181.

The lower federal courts are in further

conflict with this Court's decision in Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976), in which the Court noted probable federal court jurisdiction for individual Indians in footnote 14. The lower courts are in further conflict with the Eighth Circuit Court of Appeals in Omaha Tribe of Indians v. Peters, 516 F.2d 133 (8th Cir. 1975) which held that an individual Indian could assert the co-plaintiff doctrine to the federal instrumentality exception to the Tax Injunction Act.

The Court in Dodge v. U.S., 362 F.2d 810 (Ct. Cl. 1966) found it unnecessary to determine the technical standing of the plaintiff as a prerequisite to allowing the equitable exception to the refund claim provision:

> "If the equitable exception applies to this case, it applies as equally to refund claims by the Indian taxpayers themselves as to claims filed on behalf of the Indians by a government official. See Red Eagle and Nash, supra. Therefore, it is not necessary to determine whether the United States, the Superintendent (as an individual) or the Indians are the real plaintiffs here. Daney, supra, says:
>
> > "Under general tax law, this statute of limitations requirement is normally a jurisdictional prerequisite.

> * * * But general rules of tax law, like general acts of Congress, do not apply to restricted Indians in such a strict manner. * * *
> * * * a refund claim can be filed by a restricted Indian at any time. * * * In other words, the non-competency of an Indian tolls the applicability of the statutes of limitations. * * *
>
> And while tax exemptions are to be strictly construed under the "general rules," the rule is just the opposite as applied to Indians: tax exemptions are found by implication in Indian tax cases. * * *
>
> Further, all Indian statutes are to be liberally construed: * * *
>
> The tax cases involving restricted, noncompetent Indians are not to be analyzed as "ordinary tax cases." * * * "[I]t is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian." [Daney collects the supporting cases.]
>
> Id. at 815.

6. The Decision of the Lower Courts Denied As Moot the Significant Class Action Issue, Thereby Denying Due Process and Equal Protection Before the Law to a Large Class Of People

The proposed class satisfies all of the prerequisites necessary to establish a class action

as required by Rule 23(a) of the Federal Rules of Civil Procedure. The class of individual enrolled members of the federally recognized Seminole Indian Tribe does exist, and the named representative is a member of the class she purports to represent. Petitioner is an enrolled member of the Seminole Indian Tribe of FLorida who resides on the Hollywood Reservation, and who has paid numerous sales taxes and franchise taxes to the Department of Revenue of the State of Florida that were erroneously and improperly assessed and collected by the State of Florida Department of Revenue. In addition, the class is so numerous (exceeding 1300 members residing on five different reservations located in five different counties in the State of Florida) that joinder of all members is impracticable. Further, there are questions of law or fact common to the class—Did the State of Florida Department of Revenue violate federal laws by assessing and collecting sales and franchise taxes from enrolled members of the Seminole Indian Tribe of Florida

residing on the reservation on their purchase of such items as automobiles and other vehicles, mobile homes, goods and materials used to make home improvements, telephone services, electrical services, propane gas services, and similar items that were purchased either on the reservation, or that were purchased off the reservation but were delivered on to the reservation, thereby becoming annexed to tribal land? Further the claims or defenses of the named representative are typical of the claims or defenses of the class in that she possesses the same interests and suffers the same injury as the class members. Finally, the named representative will fairly and adequately protect the interests of the class.

If separate actions were prosecuted by or against individual members of the class, a risk would be created of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the State of Florida Department of Revenue. Moreover, the State of

Florida Department of Revenue has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. The questions of law or fact common to the members of the class predominate over any questions affecting only individual members so that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

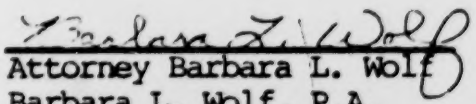
CONCLUSION

The petition for a Writ of Certiorari should be granted; in the alternative, the matter should summarily be remanded to the United States District Court of the Southern District of Florida for a full and complete review not inconsistent with this Court's prior rulings.

Dated: Fort Lauderdale, Florida

July 6, 1990

Respectfully submitted,



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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 89-5234

JUDYBILL OSCEOLA, et al enrolled
member of the Seminole Indian Tribe
of Florida and all others similarly
situated, Plaintiff-Appellant,
versus
FLORIDA DEPARTMENT OF REVENUE,
Defendant-Appellee.

Appeal from the United States District Court for

Southern District of Florida

ON PETITIONS FOR REHEARING AND SUGGESTIONS OF

REHEARING IN BANC

(Opinion February 6, 1990, 11 Cir., 198__, ___F.2d__)

Before HATCHETT and COX, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this

cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

Joseph W. Hatchett

United States Circuit Judge ORD-42

FILED

U.S. COURT OF APPEALS

ELEVENTH CIRCUIT

APR 11 1990

MIGUEL J. CORTEZ

CLERK

APPENDIX B

Judybill OSCEOLA, et al enrolled member
of the Seminole Indian Tribe of Florida
and all others similarly situated,

Plaintiff-Appellant,

v.

FLORIDA DEPARTMENT OF FEVENUE

Defendant-Appellee.

No. 89-5234

United States Court of Appeals

Eleventh Circuit.

Feb. 6, 1990.

Indian brought action challenging application of Florida sales and franchise taxes to property which she purchased off the reservation for use on the reservation. The United States District Court for the Southern District of Florida, No. 88-6522-CivJAG, Jose A. Gonzalez, Jr., J., 705 F. Supp. 1552, dismissed, and Indian appealed. The Court of Appeals, Hatchett, Circuit Judge, held that

individual Indian could not avoid the bar of the Tax Injunction Act under the instrumentalities exception.

Affirmed.

1. FEDERAL COURTS 27

Tax Injuntion Act was intended to prevent taxpayers from using federal courts to raise questions of state or federal tax law relating to the validity of particular taxes. 28 U.S.C.A. 1341.

2. FEDERAL COURTS 27

Taxpayer must follow required state procedure to challenge validity of particular state tax and is generally deprived of access to federal courts to obtain determination of federal issues. 28 U.S.C.A. 1341.

3. FEDERAL COURTS 27

Florida provides a plain, speedy, and efficient remedy for when challenging validity of application of sales tax so as to make Tax Injunction Act

applicable to action challenging application of Florida sales tax; Florida circuit courts have jurisdiction to hear challenges to any state tax and have the power to issue declaratory and injunction relief, and taxpayer has the statutory right to seek a tax refund from the state. West's F.S.A. 72.011, 215.26; West's F.S.A. Const. Art. 5, 20(c)(3); 28 U.S.C.A. 1341.

4. FEDERAL COURTS 27

Under the "instrumentalities exception" to the Tax Injunction Act, a plaintiff is not required to follow state procedures and remedies before invoking jurisdiction of the federal courts if plaintiff is an instrumentality of the United States. 28 U.S.C.A. 1341.

5. FEDERAL COURTS 27

Only an Indian tribe or governing body duly recognized by the Secretary of the Interior can assert federal court jurisdiction over claims brought by Indian tribes under the Constitution to

defeat the jurisdictional bar of the Tax Injunction Act under the instrumentalities exception to that bar; individual Indian could not avoid the bar of the Act when seeking to challenge application to her of state sales and franchise taxes. 28 U.S.C.A. 1341, 1362.

Appeal from the United States District Court for the Southern District of Florida.

Before HTACHETT and COX, Circuit Judges, and HENDERSON, Senior Circuit Judge.

HATCHETT, Circuit Judge.

In this appeal, an individual Seminole Indian, who is not a tribe representative or official, asserts that the district court erred in ruling that 28 U.S.C. 1362, which provides federal question jurisdiction for Indian tribes, does not also serve as an exception to the bar of the Tax Injunction Act (28 U.S.C. 1341). We affirm.

FACTS

Judybill Osceola brought this action as an alleged class representative of all Florida Seminole Indians ("appellants"). Osceola filed this lawsuit in her individual capacity and not as an official of a recognized tribal government. She alleged that the state of Florida unconstitutionally collected sales tax and franchise tax on the purchase of vehicles, motor homes, goods and materials, telephone services, electrical services, propane gas service, and similar items purchased off the reservation but delivered or taken to Osceola's residence on the reservation. Osceola sought declaratory relief, injunctive relief, and damages in the form of a refund of tax payments erroneously assessed by the state of Florida ("state") from 1956 to the present.

PROCEDURAL HISTORY

Osceola sought recovery under 28 U.S.C. 1331, 28 U.S.C. 1343, 42 U.S.C. 1983, and the commerce clause. The state moved to dismiss the complaint

alleging that the Tax Injunction Act (28 U.S.C. 1341) and the eleventh amendment to the United States Constitution barred such an action. The district court granted the state's motion to dismiss and denied Osceola's motion for class certification because the issue was moot. 705 F. Supp. 1552. The district court held that Osceola, an individual, could not invoke jurisdiction under the provisions of 28 U.S.C. 1341. The district court also held that Osceola did not establish jurisdiction under any of the other independent statutory grounds. Alternatively, the district court held that the eleventh amendment barred the lawsuit.

CONTENTIONS

Osceola contends that the Tax Injunction Act is not a bar to this lawsuit, and thus the district court erred when it dismissed the case for lack of jurisdiction. She also contends that the district court has subject matter jurisdiction under 28 U.S.C. 1331, 28 U.S.C. 1343(3), 42 U.S.C. 1983, the

Commerce clause of the United States, and binding case law.

The state contends that the Tax Injunction Act bars the district court from hearing a lawsuit brought by an individual Indian challenging the constitutionality of a state's sales tax.

ISSUE

The issue is whether the Tax Injunction Act bars individual Indians from bringing a lawsuit in federal court challenging the constitutionality of a state's sales tax.[1]

DISCUSSION

(1,2) Section 1341 of Title 28 of the United States Code ("Tax Injunction Act' or "the Act") provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the

courts of such state." The Act does not confer jursidiction, but instead limits jurisdiction which might otherwise exist. May v. Supreme Court of Colorado, 508 F.2d 136 (10th Cir.1974), cert. denied, 422 U.S. 1008, 95 S.Ct. 2631, 45 L.Ed.2d 671 (1975). The Tax Injunction Act was intended to prevent taxpayers from using federal courts to raise questions of state or federal law relating to the validity of particular taxes. Wells v. Malloy, 510 F.2d 74 (2d Cir.1975). After passage of the Act, a taxpayer must follow required state procedure and is generally deprived of access to federal courts to obtain determination of federal issues. Geo. F. Alger Co. v. Peck, 347 U.S. 984, 74 S.Ct. 853, 98 L.Ed.1120 (1954). While the Act on its face bars injunctive relief, it has been judicially expanded to include suits for declaratory relief. California v. Grace Brethren Church, 457 U.S. 393, 102 S. Ct. 2498, 73 L. Ed.2d 93 (1982); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 63 S. Ct. 1070, 87 L.Ed. 1407 (1943). The Act has also been applied to actions for damages, including suits for the

refund of tax assessments made by a state. Rosewell v. LaSalle Nat. Bank, 450 U.S. 503, 101 S. Ct. 1221, 67 L.Ed.2d 464 (1981); Fair Assessment in Real Estate Ass'n. Inc. v. McNalry, 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981); Bland v. McHann, 463 F.2d (5th Cir. 1972), cert denied, 410 U.S. 966, 93 S. Ct. 1438, 35 L.Ed.2d 700 (1973); The Assiniboine & Sioux Tribes v. Montana, 568 F.Supp. 269 (C.Mont. 1983).

Unless this case fits within a recognized exception, the Tax Injunction Act clearly bars federal courts from maintaining jurisdiction under the circumstances present in this case.

(3) The state correctly argues that Florida provides a "plain, speedy, and efficient remedy." The Florida constitution grants to the state's circuit courts jurisdiction to hear challenges to any state tax. Fla. Const. art. V, 20(c)(3). Florida courts are also given power to issue declaratory and injunctive relief in tax cases. See

Fla. Stat. Ann. 72.011 (West Supp. 1988) and 86.011 (West 1987). Furthermore, a Florida taxpayer has the statutory right to seek a tax refund from the state. Fla. Stat. Ann. 215.26 (West 1971). The Florida Supreme Court has held that this statute (215.26) authorizes the refund of taxes paid under an unconstitutional law. State ex rel. Hardaway Contracting Co. v. Lee, 155 Fla. 724, 21 So. 2d 211 (1945). Moreover, this circuit has held that the Florida tax remedies are "plain, adequate and complete." See Winicki v. Mallard, 783 F.2d 1567, 1570 (11th Cir.) cert .denied, 479 U.S. 815, 107 S. Ct. 70, 93 L.Ed.2d 27 (1986).

(4) Recognizing the applicability of the Tax Injunction Act, Osceola's principal argument is that federal jurisdiction can be invoked under what has become known as "the instrumentality exception." Department of Employment v. United States, 385 U.S. 355, 87 S.Ct. 464, 17 L.Ed.2d 41 (1966). This exception provides that the jurisdictional barrier of 28 U.S.C. 1341 is "inapplicable to suits brought

by the United States 'to protect itself and its instrumentalities from unconstitutional state exactions.'" Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 470, 96 S.Ct. 1634, 1640, 48 L.Ed.2d 96 (1976) (citations omitted). The federal instrumentalities doctrine establishes "that 1341 does not act as a restriction upon suits by the United States to protect itself or its instrumentalities from unconstitutional state action." Dept. of Employment v. United States, 385 U.S. at 358, 87 S.Ct. at 467. Thus, under the instrumentalities exception, a plaintiff is not required to follow state procedures and remedies before invoking the jurisdiction of the federal courts.

Indian lands have long been regarded as an instrumentality of the United States; thus, the United States can enjoin state taxation of Indian lands. See Moses v. Kinnear, 490 F.2d 21 (9th Cir. 1973). The federal instrumentality doctrine has also been used to defeat the jurisdictional bar of section 1341 in cases where a party, other than the

United States, files a lawsuit challenging the constitutionality of a state's taxing scheme.

Osceola argues that the federal instrumentality exception, as modified by the co-plaintiff's doctrine applies to suits brought by individual Indians. See Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973); see also Moses, 490 F.2d 21 (9th Cir. 1973) (instrumentality doctrine applies where suit could have been brought by the United States and is in fact brought by parties who could properly be co-plaintiffs with the United States.) Osceola also argues that Confederated Salish & Kooteni Tribes v. Moe, 392 F.Supp. 1297 (D.Mont. 1975) aff'd, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) allows her access to federal courts. Moe involved a consolidated appeal by an Indian and also by class representatives of individual tribe members. A special three-judge district court panel accepted jurisdiction based on the federal instrumentality doctrine. The district court concluded:

> While the exceptions to section 1341 have been expressed most often in terms of the federal instrumentality doctrine, we do not view the exceptions as limited to cases where this doctrine is clearly applicable. It seems clear [that section 1341] does not bar federal court jurisdiction in cases where immunity from state taxation is asserted on the basis of federal law with respect to persons or entities in which the United States has a real and significant interest.

Moe, 392 F.Supp. at 1303. The Supreme Court affirmed the district court, holding that, notwithstanding the provisions of 28 U.S.C. 1341 prohibiting a federal district court from enjoining the assessment of any state tax where an adequate remedy may be had in state courts, the district court had jurisdiction under 28 U.S.C. 1362. Moe v. Confederated Salish & Kooteni Tribes, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976). Relying on the district court's reasoning and the Supreme Court's affirmance, Osceola argues that 28 U.S.C. 1341 is

not a bar to suits brought by individual Indians where the United States has a real and significant interest.

Osceola's reliance on Moe is misplaced. Although the Moe Court affirmed the district court's finding of jurisdiction, it did so on grounds different from those Osceola asserts. In affirming, the Court stated that Indian tribes suing pursuant to 28 U.S.C. 1362 were not barred by the provisions of 28 U.S.C. 1341.[2] The Court concluded that "all substantive issues raised on appeal can be reached by deciding the claims of the tribe alone, which [brought the] action in the district court under section 1362." The Moe Court then examined the legislative history of 28 U.S.C. 1362 to determine whether Indian tribes suing under section 1362 are exempt from the provisions of 28 U.S.C. 1341.

Initially, the Court noted "that the mere fact that a jurisdictional statute such as 1362 speaks in general terms of 'all' enumerated civil actions does not itself signify that Indian tribes are exempted from the provisions of 1341." Moe 425 U.S. at 472,

96 S.Ct. 1t 1641. After determining that section 1362 does not provide a blanket exemption to 28 U.S.C. 1341, the Court examined the legislative history of section 1362 to determine if it contemplated an exemption under the circumstances before the Court. The Court concluded that Congress "intended to open the federal courts to the kind of claims that could have been brought by the United States as trustees, but for whatsoever reason were not so brought." Moe, 425 U.S. at 172, 96 S.Ct. at 1641. The Court further concluded "that Congress contemplated that a tribe's access to federal court to litigate a matter arising 'under the Constitution, laws or treaties' would be a least in some respects as broad as that of the United States suing as the tribe's trustee." Moe, 425 U.S. at 473, 96 S.Ct. at 1641 (emphasis added). The Moe Court reasoned that, "[s]ince the United States is not barred by section 1341 from seeking to enjoin the enforcement of a state tax law, [citation omitted]...the tribe is not barred from doing so here." Moe, 425 U.S. at 474-75, 96 S.Ct. at 1642.

[5] The Supreme Court's analysis leads us to conclude that only an Indian tribe or a governing body duly recognized by the Secretary of the Interior, can rely on section 1362 to defeat the jurisdictional bar of 28 U.S.C. 1341. Contrary to Osceola's assertion, nothing in Moe suggests that the Supreme Court extended the federal instrumentality exception to suits in federal courts by individual Indians. In fact, the court clearly rejected the district court's expansive interpretation of the federal instrumentality doctrine by stating that

> [w]hile the concept of a federal instrumentality may well have greater usefullness in determining the applicability of section 1341, [citation omitted] than in providing the touchstone for deciding whether or not Indian tribes may be taxed, [citation omitted] we do not believe that the district court's expanded version of this doctrine, quoted above, can by itself avoid the bar of section 1341. [Emphasis added.]

Moe, 425 U.S. at 471-72, 96 S.Ct. at 1640.

In arguing that the federal instrumentality exception extends to suits brought by individual Indians, Osceola also relies on Omaha Tribe v. Peters, 516 F.2d 133 (8th Cir. 1975). In Omaha Tribe, the Eighth Circuit, relying on Moses v. Kinnear, 490 F.2d 21 (9th Cir. 1973), held that individual Indians could assert the federal jurisdictional bar to 28 U.S.C. 1341. Omaha Tribes, 516 F.2d at 136. The Moses decision, however, was later expressly rejected by the Ninth Circuit in Dillon v. Montana, 634 F.2d 463 (9th Cir. 1980). The Dillon court, relying on Moe, held that the federal instrumentality exception extends only to suits brought by Indian tribes Dillon, 634 F.2d at 469. See also Navajo Tribal Utility Authority v. Arizona Dept. of Revenue, 608 F.2d 1228, 1233-34 (9th Cir. 1979) (individual tribe members could not be treated as an Indian tribe or band for the purposes of 28 U.S.C. 1362 and could not reap the benefit of the co-plaintiff rule to avoid the jurisdictional bar of 28 U.S.C. 1341).

Additionally, the Dillon court rejected the argument that individual Indians are exempt from the provisions of 28 U.S.C. 1341 based on 28 U.S.C. 1362.

CONCLUSION

We conclude that the state has a plain, speedy and efficient remedy for any alleged constitutional violation of its sales tax provisions. Thus, the Tax Injunction Act bars Osceola from challenging the state's sales tax. The district court is affirmed.

AFFIRMED.

Footnotes:

[1] Because we conclude that the Tax Injunction Act bars this lawsuit, we need not address the other issues raised on appeal.

[2] Title 28 U.S.C. 1362 states: The district courts shall have original jurisdiction of all civil

actions, brought by an Indian Tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws or treaties of the United States.

APPENDIX C

705 F. Supp. 1552 (S.D.Fla. 1989)

Judybill OSCEOLA, Enrolled Member of
the Seminole Indian Tribe of Florida,
el al., all others similarly situated,
Plaintiffs,

v.

FLORIDA DEPARTMENT OF REVENUE,
Defendants.

No. 88-6522-CIV-JAG

United States District Court,

S.D. Florida,

Fort Lauderdale Division.

Feb. 17, 1989.

Alleged class representative of Indians in Florida brought action in individual capacity challenging Florida's imposition of sales and franchise taxes on property and services purchased off the reservation

but delivered or taken to her residence on the reservation. The State Department of Revenue moved to dismiss complaint. The United States District Court, Gonzalez, J., held that: (1) Buck Act did not provide federal court jurisdiction under instrumentality exception to Tax Injunction Act; (2) state taxes were not preempted by congressional legislation; and (3) Eleventh Amendment barred action.

Motion granted.

1. TAXATION 181

Buck Act did not immunize Indians from state taxation, as would have allowed federal court jurisdiction to hear challenge to Florida tax by individual allegedly representing Indians in Florida under federal instrumentality exception to Tax Injunction Act. 28 U.S.C.A. 1341; 4 U.S.C.A. 109.

2. FEDERAL COURTS 195

Statute which ceded civil and criminal jurisdiction over Indian lands to states did not

provide federal court with jurisdiction to hear action by alleged representative of Indians in Florida challenging state taxation. Civil Rights Act of 1968, 402(a), 25 U.S.C.A. 1322(a); 28 U.S.C.A. 1341.

3. INDIANS 27(2)

Statute which granted district court jurisdiction to hear actions brought by Indian tribe or band with governing body duly recognized by Secretary of Interior did not grant jurisdiction to hear challenge to Florida tax brought by alleged class representative of Indians in Florida in her individual capacity. 28 U.S.C.A. 1362.

4. CIVIL RIGHTS 13.9

Federal court did not have jurisdiction to hear Sec. 1983 claim advanced by alleged representative of Indians in Florida challenging state taxation absent showing that Florida's statutory scheme for tax returns was not plain, speedy and efficient remedy. 28 U.S.C.A. 1343(3); 42 U.S.C.A. 1983.

5. STATES 18.75

TAXATION 1209

State sales and franchise taxes on property and services purchased off Indian reservation but delivered or taken to residence on reservation were not preempted by congressional legislation.

6. FEDERAL COURTS 265

Eleventh Amendment barred Indian's action challenging Florida tax. U.S.C.A. Const. Amend.11.

Barbara Wolf, Fort Lauderdale, Fla., for plaintiffs.

Joseph C. Mellichamp, III, Eric Taylor, Asst. Attys. Gen., Dept. of Legal Affairs, Tallahassee, Fla., for defendants.

ORDER

GONZALEZ, District Judge.

THIS CAUSE has come before the court upon the various motions in this cause. The defendants have

moved to dismiss the complaint pursuant to Federal Rule 12(b)(1) and (6). The plaintiff has filed a response to the motion to dismiss which the court has received and considered.

The plaintiff has brought this action as an alleged class representative of all Florida's Seminole Indians. The suit was filed by the plaintiff in her individual capacity and not as an official representative of a recognized tribal government.

As stated by the plaintiff, this action was brought because of the "collection of sales taxes and franchise taxes from Petitioners by Respondent on Petitioner's purchase of automobiles and other vehicles, mobile homes, goods and materials used to make improvements to their homes, telephone services, electrical service, propane gas service, and similar items that were purchased off the reservation but which were delivered or taken to Petitioner's residence on the reservation." See Memorandum in Support of Petitioner's Response to Respondent's Motion to Dismiss at 2. The complaint

prays for declaratory relief, injunctive relief against the defendant from future collection of these taxes, and damages in the form of a refund of tax payments erroneously assessed by the state between the years 1956 to the present day.

Defendants move to dismiss the complaint alleging that the Tax Injunction Act, 28 U.S.C. 1341, and the Eleventh Amendment bar this action.

Section 1341 of Title 28 of the United States Code provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficienty remedy may be had in the courts of such State.

The Tax Injunction Act manifests the maxim that a court should not act, in equity, when there is an adequate remedy at law. The statute also reflects the federal interest in comity between the national and state soverwigns. Because states rely upon taxation to carry on their governments, the federal sovereign, through its judiciary, is reluctant to

interfere in this basic state function. See Tully v. Griffin, 429 U.S. 68, 73, 97 S.Ct. 219, 222, 50 L.Ed.2d 227 (1976); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 297-99, 63 S.Ct. 1070, 1072-74, 87 L.Ed. 1407 (1943).

On its face, the Act bars injunctive relief. It has been judicially expanded to include suits for declaratory relief, California v. Grace Brethren Church, 457 U.S. 393, 102 S.Ct. 2498, 73 L.Ed.2d 93 (1982); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943). Moreover, the Act has been applied to actions for damages, Rosewell v. LaSalle National Bank, 450 U.S. 503, 101 S.Ct. 1221, 67 L.Ed.2d 464 (1981), reh'g denied, 451 U.S. 1011, 101 S.Ct. 2349, 68 L.Ed.2d 864 (1981); Fair Assessment in Real Estate v. McNary, 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981), including suits for the refund of tax assessments made by a state, Bland v. McHann, 463 F.2d 21 (5th Cir.1972); The Assiniboine & Sioux Tribes v. Montana, 568 F.Supp. 269 (D.Mont. 1983).

The defendants allege that the Tax Injunction Act applies here because Florida provides a "plain, speedy and efficient remedy". The Florida Constitution grants the state's Circuit Courts with jurisdiction to hear challenges to any state tax. Fla. Const. art. V, 20(c)(3). Florida courts are also given power to issue declaratory and injunctive relief in tax cases. See FLA.STAT.ANN 72.011 (West Supp.1988) and 86.011 (West 1987).

A Florida taxpayer also has the statutory right to seek a tax refund from the state. FLA.STAT.ANN 215.26 (West 1971). The Florida Supreme Court has held that this statute authorizes the refund of taxes paid under an unconstitutional law. State ex rel. Hardaway Contracting Co. v. Lee, 155 Fla. 724, 21 So.2d 211 (1945) (refund authorized under subsection (1)(c) as a tax paid "in error"); cf. Acquarius Condominium Assoc. v. Markham, 442 So.2d 423 (Fla.App. 4th DCA 1983) (questioning whether a taxpayer can ever be denied his day in court to challenge a tax law).

The plaintiff does not allege that the state remedies are inadequate. Even if the plaintiff did take such a position, it would likely lack merit. See Winicki v. Mallard, 783 F.2d 1567, 1570 (11th Cir. 1986) (noting district court's ruling that Florida tax remedies were "plain, adequate and complete"); cf Rosewell v. LaSalle National Bank, 450 U.S. 503, 101 S.Ct. 1221, 67 L.Ed.2d 464 (1981) (state refund procedure adequate under Sec. 1341 despite two-year delay in receiving refund and failure of state to pay interest on the refund), reh'g denied, 451 U.S. 1011, 101 S.Ct. 2349, 68 L.Ed.2d 864 (1981).

[1] Rather than attack the adequacy of the state remedies, the plaintiff contends that this court has jurisdiction under the instrumentality exception to the Tax Injunction Act. This doctrine states that the Sec. 1341 jurisdictional bar does not apply to actions brought by the United States or one of its instrumentalities. The issue, then, is whether a class action by individual, enrollmed members of an

Indian tribe constitutes a federal instrumentality for purposes of immunity from state taxation.

The plaintiff's contention that this is a suit by a U.S. instrumentality is apparently based upon the historical trustee relationship existing between the federal government and the various Indian tribes. The test today of what or who constitutes an instrumentality is a question of Congressional intent. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2 114 (1973). Here, the test is whether Congress has designated the members of the Seminole Indian tribe as federal instrumentalities.

The plaintiff relies upon Title 4 of the United States code, sections 105 through 110 (known as the "Buck Act") as evidence that Congress exempted the Seminole Indians from all state taxation. Specifically, the plaintiff points to section 109 which provides: "Nothing in sections 105 [state sales and use tax] and 106 [state income tax] of this title shall be deemed to authorize the levy or

collection of any tax on or from any Indian not otherwise taxed."

Plaintiff's reliance on the Buck Act is misplaced. The legislation was passed in 1947 simply to allow states to tax federal employees living in their state, but working on federal lands. In effect, the federal government ceded some degree of sovereignty over federal areas to the states. See Rountree v. City and County of Denver, 197 Colo. 497, 596 P.2d 739 (1979). Contrary to plaintiff's view, section 109 is not an affirmative grant of immunity. Rather, this section of the Buck Act merely reaffirms that the federal government did not intend, through the passage of legislation, to grant any more jurisdiction to the states over the Indian tribes other than that which they already possessed.

Moreover, the Buck Act surely did not have the broad scope argued for by the plaintiff. In construing the tax immune status of Indians, the Supreme Court has stated a rule of construction fatal to plaintiff's argument. In Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S.Ct. 1267, 36

L.Ed.2d 114 (1973), the Court held that the state of New Mexico could impose a gross receipts tax on a ski resort operated by an Indian tribe on nonreservation land leased from the federal government. In ruling that the tribe was not a federal instrumentality, the Court stated that the rule that tax exemptions are not granted by implication applied to state taxation of Indians as well as all others. 411 U.S. at 156-57, 93 S.Ct. at 1274-75. Here, section 109 of the Buck Act is certainly not the type of specific statement that Congress would have passed to immunize Indians from state taxation.

[2-4] Alternately, the plaintiff relies on other federal statutes to give this court jurisdiction. However, none of these apply either to provide an independent jurisdictional base or to override the Tax Injunction Act. Section 1322(a) of Title 25, United States Code, which cedes civil and criminal jurisdiction over Indian lands to the states is irrelevant and actuarlly supports the defendant's position. Section 1362 of Title 28 is inapplicable

because the statute only applies to actions brought by an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior". Finally, plaintiff's reliance upon 42 U.S.C. 1983 and 28 U.S.C. 1343(a)(3) (granting jurisdiction over Sec. 1983 actions to federal districts courts) is equally meritless. The law is clear that section 1983 claims advanced by the plaintiff cannot be heard unless there is a showing that Florida's statutory scheme for tax refunds is not a plain, speedy and efficient remedy. Winicki v. Mallard, 783 F.2d 1567, 1570 (11th Cir.1986).

Historically, Indians have only been exempted from state taxation of reservation property or on income derived from reservation activities. Mescalero Apache Tribe v. Jonesc, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114 (1973). As the Supreme Court stated, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to

all citizens of the State." Mescalero, 411 U.S. at 148-49, 93 S.Ct. at 1270-71.

Plaintiff cites Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976), as support. However, this case is in line with the above-mentioned authorities which hold that the state has a limited right to tax reservation Indians. In Moe, the Court held that the state of Montana could not impose (1) a personal property tax on property located on the reservation, (2) a vendor tax on the tribe's cigarette business conducted on reservation lands, or (3) a sales tax on cigarettes for on-reservation sales between Indians. Cf. Bryan v. Itasca County, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976) (state personal property tax on Indian's mobile home located on lands held in trust for the tribe invalid); McClanahan v. State Tax Comm. of Arizona, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) (state income tax unlawful as to Indian income derived solely from on-reservation sources).

[5] Therefore, it is clear that the Florida taxes here are not preempted by any Congressional legislation. The only other possible limitation applicable is that a state cannot tax Indians in such a way as to unduly interfere with the tribal right of self-government. However, this limitation is also irrelevant. There is no evidence of any impermissible state interference and no showing that further discovery is necessary. It is also noteworthy that the Seminole tribe itself did not bring this action or move to intervene as a party. Simply put, there is little chance of state interference with an Indian nation's sovereignty when one of its members ventures into another sovereignty, purchases goods and services there, and is required to pay a tax on those purchases.

[6] The defendant's motion to dismiss is also justified on the alternate ground that the Eleventh Amendment bars this action.

Under the theory that an Indian tribe constitutes a "foreign nation", courts have held that the Amendment is applicable to Indians. See Standing

Rock Sioux Indian Tribe v. Dorgan, 505 F.2d 1135 (8th Cir. 1974).

The defendant is correct in asserting the Eleventh Amendment bar.

There are no applicable exceptions. The plaintiff has failed to point to any Congressional enactments under the Fourteenth Amendment which abrogate Florida's sovereign immunity. Even if plaintiff were to rely upon the statutes cited above against the application of the Tax Injunction Act, they do not provide a clear state of Congressional waiver. See Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976); Quern v. Jordan, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979) (Congress did not abrogate Eleventh Amendment immunity by passage of 42 U.S.C. 1983). Moreover, the state of Florida has not consented to plaintiff's action. Section 215.26(4) of the Florida Statutes provides that a refund action under that section is the "exclusive procedure and remedy for refund claims between individual funds and accounts in the State Treasury".

The plaintiff's only argument is that the Eleventh Amendment does not prevent a federal court from enjoining a state official from violating federal rights. While the plaintiff is correct about this power of the federal courts as recognized in Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), it is not applicable here. As discussed above, the plaintiff has failed to establish the prerequisite to injunctive relief; namely, violation of federal rights by the state of Florida.

The court having considered the motion to dismiss, and being otherwise duly advised, it is hereby

ORDERED AND ADJUDGED as follows:

(1) The defendant's motion to dismiss is GRANTED and this cause is hereby DISMISSED. This court lacks subject matter jurisdiction over this case pursuant to the Tax Injunction Act and the Eleventh Amendment. The court does not reach the other arguments advanced by the defendants in support of their motion except to the extent discussed in the opinion.

(2) The plaintiff's motion for class certification is hereby DENIED as moot.

(3) The defendant's motion for a stay is hereby DENIED as moot and on the merits. The interests of public officials protected by the Supreme Court in Mitchell v. Forsyth, 469 U.S. 929, 105 S.Ct. 322, 83 L.Ed.2d 259 (1984) are in conflict with the policies underlying class actions as enunciated in the case of Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). Further, the defendant did not either move for a protective order or otherwise allege that the plaintiff was engaging in broad, burdensome discovery.

DONE AND ORDERED.

No. 90-653

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JUDYBILL OSCEOLA, at al.,

Petitioners,

v.

FLORIDA DEPARTMENT OF REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL
STATE OF FLORIDA
JOSEPH C. MELLICHAMP, III
SENIOR ASSISTANT ATTORNEY GENERAL
ERIC J. TAYLOR
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Attorneys for Respondent,
Florida Department of Revenue

QUESTION PRESENTED

Was the decision by both the District Court and the Court of Appeals that the Tax Injunction Act, 28 U.S.C. Section 1341, barred individual Indians, as opposed to a recognized tribal authority, from bringing a lawsuit in a federal court challenging the constitutionality of a state's sales tax correct and not in conflict with the decisions of this Court and the other courts of appeal? A1/

A1/ The Petitioner presents a number of "Questions Presented." However, a number of those listed by the Petitioners were either not raised by the Petitioners below (Question #3, see, 705 F.Supp. 1552, 1553 (S.D. Fla. 1989) or not addressed by the Court of Appeals in its final decision (Question #'s 1, 4 and 6, see, 893 F.2d 1231, 1232 n.1 (11th Cir. 1990).

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed by the Petitioners in their Petition, the Florida Department of Revenue was also a party to the proceedings below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATEMENT OF THE CASE

This case was originally filed in the United States District Court for the Southern District of Florida on July 7, 1988. The Petitioners, individual members of the Seminole Indian Tribe in Florida, alleged that the State of Florida illegally collected sales taxes from them when the individual Indians purchased, from off-reservation commercial enterprises, retail goods and materials such as automobiles. The Petitioners sought a refund for all sales taxes collected by the State since 1956 and an injunction against the State from collecting sales taxes from the individual Indians in all future sales transactions.

The Florida Department of Revenue responded to the Petitioners' complaint by filing a motion to dismiss. The State argued that the case was barred by the Tax Injunction Act, 28 U.S.C. Section 1341, and the Eleventh Amendment to the United States Constitution.

The district court ruled that the Petitioners were barred by the Tax Injunction Act and the Eleventh Amendment from bringing their action in federal court. The court rejected the Petitioners' federal instrumentality/co-plaintiff argument as well as the Petitioners' assertion of jurisdiction under 28 U.S.C. Section 1362.

The Petitioner appealed the case to the Eleventh Circuit Court of Appeals.

The Court of Appeals restricted its decision to the Tax Injunction Act issue and affirmed the decision of the dictrict court.

REASONS FOR DENYING THE WRIT

The Petitioners do not present any grounds for granting certiorari as set forth in Rule 10 of the Rules of this Court. Respondent respectfully submits that the Petition be denied.

The essence of the Petitioners' argument is that the decision of the Eleventh Circuit Court of Appeals, ruling that the Tax Injunction Act, 28 U.S.C. Section 1341, barred individual Indians from bringing a lawsuit in a federal court to challenge a state tax or the state's taxing authority, is in conflict with decisions of this Court and other courts

of appeals. 1/

Respondent submits a review of the cases cited by the Petitioners reveal no conflict on this issue, or, if there does exist some conflict, the conflict is not substantial and is not of the type to make this case deserving of review. The Respondent would thus assert that the decision below is consistent with other

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1/ The Petitioners have raised a number of issues in their Petition for Writ of Certiorari. While a number of these issues were also presented to the Court of Appeals by the Petitioners, the Court of Appeals decided the case before them solely on their interpretation of the Tax Injunction Act and did not address any of the other issues raised by the Petitioners in the case below. See, 893 F.2d 1231, 1232 n.1 (11th Cir. 1990). Thus, those issues presented to this Court by the Petitioners, other than those related to the Tax Injunction Act, are improperly raised and will not be addressed by the Respondent in this Brief.

decisions addressing the state tax issues raised by individual Indians rather than a tribal authority.

THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT OR OTHER COURTS OF APPEAL ON THE APPLICATION OF THE TAX INJUNCTION ACT, 28 U.S.C SECTION 1341, TO INDIVIDUAL INDIANS

In order to warrant a writ, there must be a "real or 'intolerable' conflict on the same matter of law or fact, and [not] merely an inconsistency in dicta. . . ." R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice Section 4.3 (6th ed. 1986).

There are two asserted conflicts presented by the Petitioners. The first arises principally from a footnote in this

Court's decision in Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) discussing the district court's finding of jurisdiction for individual Indians in that case. However, as will be detailed later, the issue presented here was not before this Court in the Moe case, nor was there a considered discussion of federal court jurisdiction in cases brought by individual Indians.

Secondly, the Petitioners assert that the Eighth Circuit Court of Appeal's decision in Omaha Tribe of Indians v. Peters, 516 F.2d 133 (8th Cir. 1975), vacated and remanded, 427 U.S. 902 (1976) is in conflict with the opinion below. However, there was no reasoned discussion in Peters of the issue presented here and

any statements made by the Eighth Circuit, that could be attributed to the issue before this Court, was at best dictum.

A review of the decision below, Judybill Osceola v. Florida Department of Revenue, 893 F.2d 1231 (11th Cir. 1990), shows that the Court of Appeals reached its conclusion, that an individual Indian cannot use 28 U.S.C. Section 1362 to avoid the Tax Injunction Act, as follows:

> 1. The Tax Injunction Act limits the jurisdiction of a federal court to entertain an action challenging a state tax, whether the party seeks declaratory, injunctive or refund relief. (893 F.2d at 1232-33);
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> 2. Florida provides the "plain, speedy and efficient remedy" required by the Tax Injunction Act. (893 F.2d at 1233);
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> 3. The only exception to the Tax Injunction Act then available to the Appellants/Indians was the "federal instrumentality" doctrine. (893 F.2d

at 1233);

4. Under the instrumentality exception, the Tax Injunction Act does not prevent the United States from bringing an action against a state in federal court. (893 F.2d at 1233);

5. Under 28 U.S.C. Section 1362, Congress permitted the United States to bring an action on behalf of a tribe as a trustee. (893 F.2d at 1234); and

6. Therefore concluding that under the federal instrumentality doctrine only Indian tribes could use Section 1362 to avoid the Tax Injunction Act. (893 F.2d at 1234).

Based upon the conclusion of its analysis, the Court of Appeals ruled that individual Indians could not rely upon the federal instrumentality doctrine or Section 1362 to avoid the dictates of the Tax Injunction Act. Id., 893 F.2d at 1235.

What is not at issue before the Court is the question of the Tax Injunction Act's effect on the United States. Respondent concedes that if the United States or an instrumentality of the United States was to question a state tax, the Tax Injunction Act would not bar the action in a federal court. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 470 (1976). See also, Department of Employment v. United States, 385 U.S. 355, 358 (1966). Furthermore, Respondent concedes that Congress has abrogated a state's immunity in 28 U.S.C. Section 1362 when an action is brought by an Indian tribe. Moe, 425 U.S. at 472-475. See also, Oneida Indian Nation of New York v. State of New York, 691 F.2d

1070, 1079 (2nd Cir. 1982).

The only issue before the Court is the question whether an "individual" Indian can use Section 1362, or the "federal instrumentality" doctrine to avoid the Congressional prohibition of the Tax Injunction Act, when the individual Indian initiates a suit in a federal court challenging a state tax.

1. THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN MOE v. CONFEDERATED SALISH & KOOTENAI TRIBES, 415 U.S. 463 (1976)

The federal instrumentality exception (earlier known as the intergovernmental instrumentality doctrine), had its genesis in the policy that no state should be permitted to impose a tax on the United

States or one of its agencies or instrumentalities. See, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) [no state taxation on the Second National Bank of the United States]. This protected the property and assets of the Federal Government. See, Weston v. City Council of Charleston, 27 U.S. (2 Pet.) 449, 467 (1829) [state taxation cannot fall on an "operation essential to the important objects for which the government was created."]. The real party in interest was not the federal agency or the "federal instrumentality," but the United States itself. See, United States v. Bureau of Revenue of the State of New Mexico, 291 F.2d 677, 678-79 (10th Cir. 1961).

The end result of the Supremacy Clause is that the Federal Government is "immune" from state taxation. If a state tax was imposed, a federal instrumentality would assert the Federal Government's immunity and any right the instrumentality would have would be a "derivative one." James v. Dravo Contracting Co., 302 U.S. 134, 158 (1937).

This Supreme Court began to mold the modern day definition of "federal instrumentality" and the instrumentality's immunity from state taxation in the case of Department of Employment v. United States, 385 U.S. 355 (1966). At issue there was the legal status of the American Red Cross and whether it was a federal instrumentality. Colorado asserted the

Red Cross was not a federal instrumentality and, thus, not immune from state taxation. In its examination, the Supreme Court found that the Red Cross was a congressionally chartered organization, subject to government supervision and auditing, with its principal head and officers chosen by the President of the United States. Id., 385 U.S. at 359. The Court noted the Red Cross aided the United States in its legal obligations, provided services to our armed forces throughout the world and provided assistance in the United States in times of disaster. Id., 355 U.S. at 359. The Court concluded that the Red Cross was an instrumentality because it was virtually "an arm of the Government." Id., 385 U.S. at 359-60.

Since that decision, the courts have interpreted the "instrumentality" doctrine narrowly. 2/ This Court revisited the instrumentality doctrine in United States v. New Mexico, 455 U.S. 720 (1982). In that case the Court was faced with various New Mexico taxes placed on contractors who had business relations with the federal government and who used federal property at the atomic energy operations in New Mexico. The contractors sought refuge from the state taxes claiming that they were covered by the federal instrumentality doctrine. The United States brought an action seeking a declaratory judgment that

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2/ For a history of the instrumentality doctrine and its expansion and contraction by the Supreme Court, see United States v. New Mexico, 455 U.S. 720, 728-733 (1982).

the contractors were not subject to New Mexico's taxes. Id., 455 U.S. at 728.

Starting with the basic precept of the Supremacy Clause, Article VI, clause 2, of the United States Constitution that a state may not lay a tax "directly upon the United States," the Court revisited the extent to which a state may constitutionally impose a tax upon federal activities, agencies or instrumentalities. Id., 455 U.S. at 733-34. The Court specifically found that it was permissible for a state to lay a tax upon a contractor providing goods to the Federal Government, even when the Federal Government reimburses the contractor for such a cost; on the earnings of a contractor providing services to the federal government; or a

use tax upon federal property in the hands of private persons, even when the private party is using that federal property to provide goods to the federal government.

The Court focused upon the actual relationship between the contractor/instrumentality and the United States. The Court specifically held that immunity from state taxation under the constitution was appropriate only in one circumstance:

> when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot be realistically be viewed as separate entities . . . (emphasis supplied)

Id., 455 U.S. at 735. This narrow interpretation of the instrumentality

doctrine was consistent with their earlier decision of City of Detroit v. Murray Corp., 355 U.S. 489, 504-05 (1958) (opinion of Frankfurter, J.), approving the concept of disallowing "direct" taxation upon the Federal Government. 3/ Id., 355 U.S. at 504-05. Finally, the New Mexico Court summed up the limits of the immunity by reaffirming the words of City of Detroit v. Murray Corp., 355 U.S. at 503, that for a private taxpayer, an instrumentality, to be immune from state taxing power, the "private taxpayer must

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3/ This position is also historically consistent with prior pronouncements of the Court such as in Weston v. City Council of Charleston, 27 U.S. (2 Pet.) 449, 467 (1829), where the Court stated that state taxation cannot fall on an "operation essential to the important objects for which the government was created."

actually 'stand in the Government's shoes'." United States v. New Mexico, 455 U.S. at 736. 4/ Thus state tax immunity is limited "only to entities that have been 'incorporated into the government structure'." Id., 455 U.S. at 737.

4/ The Court also noted other statements of the standard to be used in finding an instrumentality such as

> so intimately connected with the exercise of a power or the performance of a duty [that taxation would be] a direct interference with the function of government itself.

(citing James v. Dravo Contracting Co., 302 U.S. 134, 157 (1937) quoting Metcalf & Eddy v. Mitchell, 269 U.S. 514, 524 (1926)); and "integral parts of [a government department]" and "arms of the Government deemed by it essential for the performance of governmental functions" citing Standard Oil Co. v. Johnson, 316 U.S. 481, 485 (1942). United States v. New Mexico, 455 U.S. at 736-37.

This Court again addressed the application of the instrumentality doctrine as it applies to Indians, in Moe. After reciting the Court's past history of the instrumentality doctrine, the Court specifically rejected the instrumentality theory as a defense for the Indian tribes. Moe, 425 U.S. at 471-72.

As this Court noted in Moe, in Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), the Court began the rejection of the instrumentality doctrine by finding that off-reservation business enterprises were not "virtually as an arm of the Government" and, thus, not an instrumentality. Id., 411 U.S. at 153. The Court refused to resurrect the expansive instrumentality doctrine has

been rejected consistently. Id., 411 U.S. at 155. Thus, in Moe, the Court again refused to expand the doctrine saying that the doctrine, as applied to Indian tribes, could, by itself, avoid the jurisdictional bar of 28 U.S.C. Section 1341. Id., 425 U.S. at 471-72.

This Court specifically declined to address the question of an individual Indian's ability to avoid the bar of the Tax Injunction Act. Id., 425 U.S. at 475, n.14. Petitioners believe that this Court's proceeding to the merits of the case as applied to the Tribe means that individual Indians can, like a Tribe, avoid the bar of the Tax Injunction Act. But that was not this Court's conclusion.

After finding that the "federal instrumentality" doctrine alone will not circumvent the bar of Section 1341, this Court went on to discuss the relationship of the Tax Injunction Act to 28 U.S.C. Section 1362, a jurisdictional statute directed to Indian tribes. The Court found that in Section 1362, Congress intended the Tribes to have the same access to the federal courts in asserting the Tribe's claims as the United States could as the trustee for the Tribe. Id., 425 U.S. at 472-73. Congress wanted the Tribes to have the ability to bring a suit even if the United States decided, for whatever reason, not to bring an action. Id., 425 U.S. at 472-73 In other words, Congress intended to codify the

instrumentality doctrine for Indian tribes and have the tribes "stand in the shoes" of the United States. Consequently, since the Tax Injunction Act did not bar the United States from bringing suit against a state, this Court concluded that, with the Tribes in the same shoes as the United States, Section 1341 did not bar a Tribe from bringing a suit against a state or local official concerning a state tax in a federal court. 5/

5/ 28 U.S.C. 1362 provides original jurisdiction in the federal courts for Indian tribes. Nothing contained in that law speaks to the jurisdiction of the federal courts over the actions of individual Indians or that individual Indians has jurisdictional right equal to that of the Indian tribes.

In conclusion, the decision of the Court of Appeals below is not in conflict with any portion of this Court's decision in Moe.

2. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISION IN OMAHA TRIBE OF INDIANS V. PETERS

The Petitioners also assert that the decision of the Court of Appeals below is inconsistent with the decision of the Eighth Circuit Court of Appeals in Omaha Tribe of Indians v. Peters, 516 F.2d 133 (8th Cir. 1975), vacated and remanded, 427 U.S. 902 (1976). 6/ Petitioners are

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6/ Vacated and remanded for further consideration in light of Bryan v. Itasca County, 426 U.S. 373 (1976). Id., 427 U.S. at 902.

incorrect in this assertion as well. 7/

Peters was a case brought by the Omaha, Santee Sioux and Winnebago Indian tribes against the State of Nebraska before this Court's opinion in Moe was rendered. The question of the Tax Injunction Act's application was addressed by the court of appeals in light of the parties before that court. The court

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7/ The Petitioners also argue that the decision of the Court of Appeals is in conflict with the case of Dodge v. United States, 362 F.2d 810 (Ct.Cl. 1966). However, that case has absolutely nothing in common with this case. Dodge was concerned with refunds of income taxes held by the United States Internal Revenue Service. The question of state taxation, the Tax Injunction Act or 28 U.S.C 1362 were not before that court. The jurisdictional question of whether a state or federal court would hear the matter was nonexistent since a suit against an agency of the United States government could only be brought in a federal court.

ruled that the instrumentality doctrine applied in the case, relying upon two earlier decisions of the Ninth Circuit, Agua Caliente Band v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971), cert. denied, 405 U.S. 933 (1972) and Moses v. Kinnear, 490 F.2d 21 (9th Cir. 1974). The Peters court found an exception to the Tax Injunction Act that permitted the federal court to hear the case. The court decided that since it believed that the United State Government could have, as a co-plaintiff, brought the action against Nebraska, the Tribes could also have brought the case in federal court. Peters, 516 F.2d at 136.

However, the ruling in Peters is quite questionable if it is intended by the

Petitioners to be used in comparison with the decision of the Eleventh Circuit Court of Appeals below. First, the case against Nebraska in Peters was brought by Indian tribes, not individual Indians alone. The question of the applicability of the Tax Injunction Act to individual Indians never arose in that case as an issue to be decided and no decision on that question was rendered by the court of appeals on that point. Any judicial comments to individual Indians being able, under the "co-plaintiff" doctrine, to avoid the jurisdictional bar of the Tax Injunction Act are pure dicta. Nor was the question of 28 U.S.C. Section 1362's effect on the Tax Injunction Act before that court.

Secondly, the two cases relied upon by the Peters court, Moses and Agua Caliente, were also brought by tribes, not individual Indians alone. Specifically, the Moses court found federal jurisdiction under 28 U.S.C. 1362 and that Section 1362 jurisdiction was not defeated by the Tax Injunction Act. Moses, 490 F.2d at 25.

Thirdly, the two cases relied upon by the Peters court, Moses and Agua Caliente, have been ignored by the Ninth Circuit itself in cases concerning individual

Indians. 8/ The Ninth Circuit first faced the question of the Tax Injunction Act's effect on a suit brought by an individual Indian, or a non-tribal entity, without a tribe also being a party in Navajo Tribal Utility v. Arizona Department of Revenue, 608 F.2d 1228 (9th Cir. 1979). In that case, Arizona had imposed taxes on the Utility. The district court had dismissed the action finding that the Utility was barred by the Tax Injunction Act to bring the action in federal court. The Ninth

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8/ While not a direct issue before the court in Moses, the Ninth Circuit, in its discussion of 28 U.S.C. Sections 1341 and 1362, noted that Section 1362 did not confer jurisdiction in the federal court on the individual claims of Mr. Moses, relying on its earlier decision in Quinault Tribe of Indians v. Gallagher, 368 F.2d 648, 656 (9th Cir. 1966). Moses, 490 F.2d at 25 n.10.

Circuit affirmed the lower court's decision finding that the Utility was not a "tribe" and, therefore, not entitled to the protection of Section 1362 because Section 1362 applied only to a "tribe" and not to "individual members of Indian tribes or bands." Id., 608 F.2d at 1231. In so deciding, the court addressed the co-plaintiff/instrumentality doctrine discussed in the earlier case of Agua Caliente and Moses. Relying on Moe, the court turned away from the instrumentality defense standing alone and decided that only in connection with Section 1362 could the co-plaintiff doctrine be utilized.

Id., 608 F.2d at 1234. 9/

Next, the Ninth Circuit directly faced the question of a case by an individual Indian in Dillon v. State of Montana, 634 F.2d 463 (9th Cir. 1980). In Dillon, the court was faced with the question of whether Mr. Dillon, as an individual Indian, had standing in federal court to contest Montana's income tax on him because he did not reside on the reservation. Again, the court rejected an individual Indian's use of the co-plaintiff doctrine without a tribe present in the litigation, Id., at 469, and restated that 28 U.S.C. Section 1362 did

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9/ The court went so far as to say in dicta that, absent Section 1362, even a tribe could not rely upon the co-plaintiff doctrine after the Moe decision. Id.

not apply to individual Indians, Id., at 469. 10/

Lastly, the Eighth Circuit itself has ruled that individual Indians, without tribes as parties with them, cannot avoid the bar of the Tax Injunction Act because Section 1362 is not applicable to suits brought by individual Indians. Wardle v. Northwest Investment Co., 830 F.2d 118, 121 (8th Cir 1987).

Therefore, the Petitioners' argument of conflict cannot withstand the test of comparison for all the other courts of

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10/ The Ninth Circuit has remained consistent ever since; an individual Indian cannot use the co-plaintiff doctrine and 28 U.S.C. Section 1362 does not permit an exception to the Tax Injunction Act when a case is brought by an individual Indian. See, Comenout v. State of Washington, 722 F.2d 574, 577 (9th Cir. 1983).

appeals addressing the very question posed to the Eleventh Circuit Court of Appeals reached the same conclusion as did the Court of Appeals below. The Eleventh Circuit Court of Appeals decision is consistent with all the others.

CONCLUSION

For the reasons given above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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